Supreme Court, U.S.
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No. 09-1536
In the

Supreme Court of the United States

GERALD MOLNAR,

Petitioner,

v.

CARE HOUSE (Child Abuse and Neglect Council Of Oakland County, Michigan), AMY ALLEN, JANICE POKELY, CITY OF TROY, RENEE MOLNAR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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August 17, 2010

COUNTER STATEMENT OF QUESTION PRESENTED

Whether the District Court properly determined that Petitioner's claims are barred under the doctrine of collateral estoppel because he previously litigated the issue of probable cause for arrest at the preliminary examination stage of his State Court Prosecution.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties remaining in the case.

CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure Statement is not required to be filed by the Respondent City of Troy, since Respondent is a political subdivision of the State of Michigan. With respect to Troy Respondent Janice Pokley, a corporate disclosure statement is also unnecessary as she is not filing this response on behalf of a nongovernmental corporation.

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OPINIONS BELOW

The United States District Court for the Eastern District of Michigan entered a published opinion and order granting summary judgment for Respondents on September 4, 2009. *See Molnar v. Care House et al.* 574 F. Supp. 2d. 772 (2008) The United States 6th Circuit Court of Appeals affirmed the granting of summary judgment in an unpublished opinion on December 29, 2009. *Molnar v. Care House et al.* 359 Fed.Appx. 623 (6th Cir. 2009)

JURISDICTION

Respondents do not dispute Petitioner's jurisdiction statement.

STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment of the Constitution of the United States. This case also involves the Civil Rights Act of 1871, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

After receiving a complaint, Troy Police Detective Janice Pokley investigated Petitioner for inappropriately touching his minor daughter Elizabeth in October 2003. Her investigation included interviewing Elizabeth's mother, attending an interview of Elizabeth at Care House, interviewing Petitioner, and reviewing police reports from other jurisdictions where Petitioner was suspected of inappropriate sexual behavior. (see RE # 10-2, Detective Pokley's Affidavit)[1]

On November 24, 2003, Detective Pokley submitted a narrative report, summarizing her investigation, to the Oakland County Prosecutor. (RE # 10-2, Detective Pokley's Narrative Report,

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[1] RE refers to "record entry" and the documents filed in the District Court.

Attached to Exh 1) On December 4, 2003, the Prosecutor signed a complaint and warrant, charging Petitioner with Criminal Sexual Conduct in the Second Degree ("CSC"). (RE #10-2, Narrative Report attached to Exh 1) Detective Pokley then swore out the warrant before a Magistrate in the Troy District Court. (RE #10-2, Exh 1 Para 38)

On December 5, 2003, Petitioner turned himself into the Troy Police Department, and was arraigned before District Court Judge Drury, who released him on personal bond. (RE # 10 2 Exh 1 Para 39)

On December 23, 2003, Petitioner appeared in the District Court for his preliminary examination. (RE # 10-2 Exh 1 Para 42, RE# 3 Page 24) This examination lasted approximately three hours. (RE # 10-2 Exh 1 Para 42) The prosecution called Elizabeth as its only witness, and the Defense called Renee Molnar, Detective Pokley and Amy Allen as witnesses. (RE # 10-2 Exh 1 Para 42) At the conclusion of the examination, District Court Judge Drury found probable cause for charging petitioner with the crime of CSC.

(RE # 10-3 Preliminary Examination Transcript attached as Exhibit 2, at Page 139, and RE # 10-4 Bind Over Order attached as Exhibit 3.)

Petitioner Gerald Molnar filed his amended complaint on January 30, 2007. The complaint set forth various alleged constitutional claims against the City of Troy, Troy Police Detective Janice Pokley, Care House, Care House Employee Amy Allen, and Petitioner's ex-spouse, Renee Molnar: false arrest and malicious prosecution in violation of the 4th amendment; denial of due process (procedural and substantive) and equal protection rights in violation of the 14th amendment; conspiracy to violate constitutional rights contrary to 42 U.S.C. §1985; and the state law claim of intentional inflection of emotional distress. Petitioner's Amended Complaint. (RE # 3Amended Complaint, Pages 30-33, 39). The complaint also set forth *a Monell* failure to train claim against the City of Troy. (RE #3 Pages 35, 36)

On February 27, 2007 Troy Respondents filed their motion to dismiss, or in the alternative, motion for summary judgment. Care House Respondents filed their motion for summary judgment on October 9, 2007. The District Court entered judgment for all Respondents on September 4, 2008. The District Court provided several grounds for granting judgment for Respondents. However, the District Court primarily relied on the doctrine of collateral estoppel in dismissing Petitioner's cause of action. *Molnar v. Care House, et al*, 574 F. Supp. 2d. 772, 789 (E.D. Mich 2008). The Sixth Circuit Court of Appeals affirmed the grant of judgment, holding that Petitioner's claims were barred under the doctrine of collateral estoppel. *See Molnar v. Care House et al.* 359 Fed.Appx. 623 (6th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. PETITIONER WAIVED HIS ARGUMENT THAT DETECTIVE POKLEY GAVE FALSE INFORMATION TO THE MAGISTRATE WHO ISSUED THE WARRANT WHEN HE FAILED TO RAISE THIS ARGUMENT IN THE DISTRICT COURT

For the first time on appeal, Petitioner now argues that "Detective Pokley... excluded exculpatory information that was known to her from her report. Consequently, the magistrate who issued the warrant for Molnar's arrest was deliberately kept in the dark about this information."[2] Respondents vehemently deny the allegation. However, in any event, Petitioner is procedurally barred from making this argument in his petition. This argument was not raised in the District Court, nor was it raised in the Court of Appeals, and thus, this argument should be deemed waived. *Pennsylvania Department of Correction v. Yeskey*, 524 U.S. 206, 212; 118 S.Ct. 1952; 141 L.Ed.2d. 215 (1998)

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[2] Petition for Writ of Certiorari at Page 10.

("Where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

Furthermore, even if the Courts were to give Petitioner the benefit of the doubt, and find that the argument was at least tangentially raised in the trial court, Petitioner is still not entitled to his requested relief. Petitioner has not provided any sworn testimony to support this allegation, and he did not provide sufficient detail to describe the alleged false information supplied by Detective Pokley. The Court rules require establishment of disputed facts through a transcript, affidavit or otherwise (sworn testimony). See Fed. R. Civ. P. 56(e), *Celotex Corporation v. Catrett*, 477 U.S. 317,324; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986) ("Rule 56(e) therefore requires the non-moving party to go beyond the pleadings, and by her own affidavits...designate 'specific facts showing that there is a genuine issue for trial'.) Therefore, the petition should be denied.

II. THE SIXTH CIRCUIT COURT OF APPEAL'S OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT AND WELL ESTABLISHED LAW

To support his petition for writ of certiorari, Petitioner asserts that the there is a conflict between the Sixth Circuit Court of Appeals and this Court. Petitioner then argues that the Sixth Circuit Court of Appeals decision is inconsistent with this Court's decision in *Allen v. McCurry*, 449 U.S. 90; 101 S. Ct. 411; 66 L.Ed. 2d 300 (1980). Although Petitioner cites the *Allen* case, he never explains the alleged conflict. His petition is lacking in this regard for good reason -- the panel's decision is consistent with this Court's case.

In *Allen*, Respondent was charged with a drug and an assault crime in state court. *Id.* at 91. He brought a motion to suppress the drugs seized from his home, which the trial court denied in part. *Id.* After his criminal trial, where Respondent was found guilty of both criminal offenses, Respondent

brought a 42 U.S.C. §1983 action, alleging that the arresting police officers violated his fourth and fourteenth amendment rights when they searched his home and seized the drugs. *Id.* The District Court granted summary judgment to the officers, holding that Respondent's claim was barred by collateral estoppel. *Id.* at 93. The Court of Appeals reversed and invoked "the special role of the federal courts in protecting civil rights." *Id.* The Court of Appeals concluded that that the § 1983 suit was McCurry's only route to a federal forum for his constitutional claim. *Id.*

This Court reversed, holding that collateral estoppel could be dispositive in 42 U.S.C. §1983 actions. *Id.* at 101. Citing to the full faith and credit statute, 28 U.S.C. § 1738, as well as the legislative history of 42 U.S.C. §1983, the Court held that issues actually litigated in state court proceedings are entitled to the same preclusive effect in a federal §1983 suit as they enjoy in the state courts where the judgment was rendered. *Id.* at 98-100.

This Court's holding in *Allen* has been reaffirmed and applied in subsequent Supreme Court decisions. For example in *Haring v. Prosise,* 462 U.S. 306; 103 S. Ct. 2368; 76 L.Ed.2d 595 (1983) this Court considered whether collateral estoppel would apply to Respondent's federal civil rights claim when he pled guilty in his Virginia criminal proceeding. On April 27, 1978 Respondent John Prosise pleaded guilty in a Virginia Circuit court of manufacturing phencyclidine *Id.* at 308 At his plea hearing, the prosecution called Detective Henry Allen who testified that he responded to Prosise's apartment, and when he arrived, two officers had arrested Prosise for possessing a controlled substance. *Id.* Detective Allen then entered Respondent's apartment where he noticed a quantity of phencyclidine. *Id.* Detective Allen obtained a search warrant, searched Prosise's apartment and then seized devices and chemical used to manufacture phencyclidine. *Id.* After taking Detective Allen's testimony, the Circuit Court judge accepted Prosise's plea and sentenced him to 25 years imprisonment. *Id.* at 309.

Prosise then filed a § 1983 action against Petitioner and members of the Arlington County Police Department alleging that the police unlawfully searched his apartment prior to obtaining the search warrant. *Id.* The District Court granted summary judgment to defendants, holding that Prosise's guilty plea precluded him from bringing his civil rights claim. *Id.* The Court of Appeals reversed and remanded for further proceedings. *Id.* at 310. This Court affirmed the decision of the Court of Appeals. In so doing, this Court relied first on the *Allen* decision. The Court first recognized that in *Allen*, the Court concluded that that the doctrine of collateral estoppel can apply to § 1983 suits against police officers to recover for Fourth Amendment violations. *Id.* at 313. The Court, again citing *Allen*, then turned to 28 U.S.C. § 1738, which requires "federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." *Id.* However, collateral estoppel will not apply where

"the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id.* citing *Allen* at 101 S.Ct. at 418. The *Haring* Court also recognized that collateral estoppel would not apply when the state court were unable or unwilling to protect federal rights. *Id.* citing *Allen* at 101 S.Ct. at 4.

The *Haring* Court then reviewed Virginia Courts' application of collateral estoppel *Id.* at 314. The Courts of Virginia held that "Unless an issue was actually litigated and determined in the former judicial proceeding, Virginia law will not treat it as final." *Id.* at 315. (internal citations omitted). "Furthermore, collateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action." *Id.* Based on Virginia law, this Court concluded that collateral estoppel would not apply for three reasons:

First, the legality of the search of Prosise's apartment was not actually litigated in the criminal proceedings. Indeed, no issue was "actually litigated" in the state proceeding since Prosise declined to contest his guilt in any way. Second, the criminal proceedings did not actually decide against Prosise any issue on which he must prevail in order to establish his § 1983 claim. The only question raised by the criminal indictment and determined by Prosise's guilty plea in Arlington Circuit Court was whether Prosise unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983.

Finally, none of the issues in the § 1983 action could have been "necessarily" determined in the criminal proceeding. Specifically, a determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of Prosise's guilty plea. *Id.*

This Court has uniformly held that issues actually litigated in state court proceedings are entitled to the same preclusive effect in a federal 42 U.S.C. §1983 suit as they enjoy in the state courts where the judgment was rendered. *Migra v Warren City School District Board of Education,* 465 U.S. 75; 104 S.Ct. 892; 79 L.Ed. 56 (1984) see also *San Remo Hotel v. City and County of San Francisco,* 545 U.S. 323; 125 S. Ct. 2491; 162 L.Ed.2d 315 (2005), ("We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have federal claims relitigated in federal court.")

Turning to this case, the Sixth Circuit Court of Appeals properly applied Sixth Circuit precedent regarding collateral estoppel, consistent with the rules set forth in *Allen* and its progeny. The law in the Sixth Circuit provides "that where the state affords an opportunity for an accused to contest probable cause at a preliminary examination and the accused does so, a finding of probable cause by the

examining...judge should foreclose re-litigation of that finding in a subsequent § 1983 action" *Smith v. Thornburgh*, 136 F.3d 1070, 1077 (6th Cir. 1997), citing *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987).

Although, the Court of Appeals did not explicitly cite to *Allen* and the other Supreme Court cases cited above, it did cite to *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001). In *Darrah*, the Plaintiff was arrested for obstructing Troy Police Officer Russell Bragg. *Id.* at 304. A preliminary examination on the criminal charge was held, where the state court determined there was probable cause to bind Plaintiff over for trial. *Id.* at 305. Ms. Darrah's case proceeded to trial, where she was acquitted. Id. Plaintiff then filed a civil rights complaint, asserting a claim of malicious prosecution. *Id.* Her malicious prosecution claim was based on the assertion that the Defendant Officer Bragg "made material false statements to the state judge that formed the basis of that court's probable cause determination." *Id.* at

311. The *Darrah* Court, citing to this Court's decision in *Haring* and then, applying Michigan collateral estoppels rules, as instructed in *Allen* and *Haring*, held that collateral estoppel would not apply because Plaintiff was not challenging the lack of probable cause, but the Officer's false testimony at the preliminary examination, and therefore, the issues were not identical. *Id.*

As distinguished from *Darrah*, collateral estoppel does apply to Petitioner's Fourth Amendment claim. Petitioner alleged in his complaint that Detective Pokley "lacked probable cause to request a warrant." (RE # 3 Page 28) He also admitted that "[o]n or about December 23, 2003 a...preliminary examination was held."(RE # 3 Page 24) Further, it is undisputed that this examination consisted of testimony from Elizabeth Molnar, Renee Molnar, Amy Allen, and Detective Pokley. (RE # 10 Exh 1 Para 42) Elizabeth Molnar was the sole witness for the prosecution, while Petitioner called Detective Pokley, Amy Allen and Renee Molnar as defense witnesses.

(RE # 10-2 Exh 1 Para 42) At the completion of the examination, which lasted approximately three hours, 52-4 District Court Judge Dennis Drury found probable cause for charging Petitioner with the crime of CSC. (RE# 10-3 Exh 2, Preliminary Examination Transcript and RE # 10-4 Exh 3, Bind Over Order) Because probable cause was found at the preliminary examination, Petitioner is barred from re litigating the issue of probable cause, and therefore dismissal of his complaint was appropriate. Therefore, his petition should be denied.

III. PROBABLE CAUSE TO ARREST AND THE INTEGRITY OF JANICE POKLEY'S INVESTIGATION WERE LITIGATED AT THE PRELIMINARY EXAMINATION

Petitioner attempts to create an artificial distinction between probable cause for prosecution and probable cause for arrest in this case. He claims that collateral estoppel should not apply because he is now challenging "the integrity of Detective Pokley's investigation," which he argues is central to the

issue of probable cause for the arrest of Petitioner, as opposed to probable cause for prosecution. He argues that the preliminary examination decided only the issue of probable cause for the prosecution of Petitioner, and therefore there is no preclusive effect. He makes this distinction, since the lower courts' recognized that Officer Pokley's testimony was not critical to the probable cause determination, since the trial court judge relied almost exclusively on the testimony of Elizabeth Molnar, the victim of the crime. Petitioner claims that probable cause to arrest/integrity of the investigation was never litigated at his preliminary examination. Petitioner's argument is meritless. The facts in this case reveal that probable cause to arrest and the integrity of the investigation were litigated at Petitioner's preliminary examination. Therefore, the Court should deny the petition.

In support of his argument, Petitioner cites to two Court of Appeals decisions. First, Petitioner

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[3] Petition for Writ of Certiorari at Page 16

[4] *Id.*

relies on an Eighth Circuit case, *Sanders v. Sears, Roebuck & Company*, 984 F.2d 972 (1993). This case does not support his argument. In *Sanders*, a Sears' security guard detained Plaintiff on suspicion of shoplifting. *Id.* at 973-974 Plaintiff was later charged and prosecuted for theft of property pursuant to a Nebraska statute. *Id.* Plaintiff requested a dismissal of the criminal charges, relying on another Nebraska statue that created a presumption as to when a prima facie shoplifting case was established. *Id.* at 974. The Nebraska trial court denied this motion, finding that this statute was inapplicable, and allowed the case to proceed to trial. *Id.* After Plaintiff was found not guilty, he brought a civil rights action against Sears and the security guard. *Id.* at 973 Both parties moved for summary judgment. The issue was the applicability of collateral estoppel and whether Plaintiff was barred from bringing the civil rights action because he lost his motion to dismiss in the trial court. *Id.* The Court found that there was no hearing adjudicating the lawfulness of the arrest by the Sears' guard. *Id.* at 975

Unlike *Sanders*, there were not two different stages in this case. In *Sanders*, there was an immediate arrest and then a subsequent prosecution after further investigation, Petitioner's arrest was a result of the criminal prosecution, and was not separate and distinct from it. Detective Pokley, unlike the security guard in *Sanders*, did not detain Petitioner and then request a warrant. Instead, Detective Pokley conducted interviews, reviewed other reported criminal activity, and then prepared a narrative report. (see RE # 10-2, Detective Pokley's Affidavit) She then submitted this information to the Oakland County Prosecutor for review. (RE #10-2, Narrative Report attached to Exh 1) The Oakland County Prosecutor charged Petitioner with the crime of CSC. Petitioner turned himself in shortly thereafter and was then released on bond. The probable cause to arrest versus the probable cause for prosecution distinction that is present in *Sanders* simply is not present in this case. Detective Pokley did not detain Petitioner prior to him being prosecuted by the County Prosecutor for CSC.

Petitioner also relies on *Golino v City of New Haven*, 950 F.2d. 864 (2nd Cir. 1991). Like *Sanders*, this case does not aid Petitioner's argument.

In *Golino*, the Court of Appeals concluded that collateral estoppel did not apply because Connecticut's probable cause hearing is procedurally limited:

> We think the district court was correct in its assessment that, for collateral estoppel purposes, the 1984 state hearing entailed procedural limitations that curtailed Golino's efforts to secure the full and fair litigation of the probable cause issue. The purpose of such a hearing is generally the evaluation of the "sufficiency" of the evidence to constitute probable cause, not the "integrity" of the evidence. See, e.g., *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir.1989); *Bailey v. Andrews*, 811 F.2d at 369-70. Thus, at such a hearing under Connecticut law, the suspect apparently has no right to call any witnesses or to introduce any evidence of his own. Nor did the state court exercise discretion to permit Golino to call witnesses or offer evidence. Rather, he was limited to cross examining the state's witnesses and submitting a written offer of proof identifying witnesses and evidence he wished to present.

> Further, in connection with the preliminary hearing, Golino had no access to the police investigative file. As has transpired in the present action, that file contained numerous items of evidence that could have been used to cross examine the police officers who testified and to create substantial questions about the existence of probable cause to prosecute Golino. *Id.* at 869-870

Contrary to *Golino*, Petitioner had a full opportunity to challenge the integrity of the investigation at his preliminary examination, and he exercised that right by calling Detective Pokley and others in his defense. Additionally, unlike in *Sanders and Golino*, Petitioner was afforded a full and fair probable cause hearing, where he could completely challenge Detective Pokley's investigation by calling witnesses, and presenting evidence. Unlike the hearings in *Sanders* and *Golino*, Petitioner's preliminary examination was extensive, lasting approximately three hours. The prosecution presented Elizabeth Molnar as its sole witness. While Defense Counsel (the same counsel in this civil litigation) called Detective Pokley, Amy Allen and Renee Molnar as defense witness-

es. They were subject to extensive cross examination by Petitioner's Counsel. (RE # 10-2 Exh 1 Para 42)

Furthermore, and contrary to Petitioner's assertions that the state court judge did not rule on the issue of probable cause for arrest, at the completion of the examination 52-4 District Court Judge Dennis Drury found probable cause for charging Plaintiff with the crime of CSC. Petitioner litigated probable cause for his arrest at the preliminary examination.

Petitioner also alludes to the fact 42 U.S.C. Section 1983 provides oversight of the state courts, which is necessary to protect against corruption. He then cites to the period in our history where the prevalence of the KKK resulted in deprivation of constitutional rights. However, unlike the historical precedent cited, Petitioner in this case was provided with a full and fair opportunity to litigate, and he was actually acquitted of the criminal charge. The Sixth Circuit Court, and also the District Court, properly applied collateral estoppel to this 42 U.S.C. Section 1983 case, and dismissal was appropriate.

Petitioner also throws in another argument to support his request for extraordinary relief. He relies on *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668 81 L.Ed. 2d 425 (1990) to support his

argument that when since there is a lower standard of proof for a civil 42 U.S.C. Section 1983 case than what is required for a criminal case, collateral estopped does not apply. According to Petitioner, "As this Court reasoned in *Dowling*, if the Government is not estopped from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof, Molnar similarly cannot be estopped in relitigating an issue in a subsequent civil 1983 action."[5] *Dowling* is inapplicable for several reasons. First, *Dowling* is not a civil rights case, but a criminal case where the prosecution submitted F.R.E. 404(b) evidence from a prior federal robbery case, where Defendant was acquitted, for the purpose of proving identification in a subsequent robbery case. *Id.* at 344. Second, *Dowling's* holding that collateral estopped would not apply to the use of other acts evidence was based on the examination of double jeopardy principles — not the full faith and credit statute as examined in *Allen*. *Id.* at 347. Further, the *Dowling* Court rejected the collateral estoppel argument because different burdens of proof; the burden of proof to admit other acts evidence is

[5] Petition for Writ of Certiorari at Page 21.

different or lower than the reasonable doubt standard- the standard in the defendant's first robbery case. *Id.* at 349. In this case, the burden of proof for Plaintiff's civil rights action, and at the preliminary examination of his criminal case is the same – probable cause. In spite of these distinctions, Petitioner now attempts to use this evidentiary ruling to bolster his argument that he should be afforded two opportunities to challenge the ultimate issue of fact, which is that there was probable cause to arrest and prosecute Petitioner for the crime of CSC. This ultimate issue was decided at Petitioner's preliminary examination. Petitioner's argument is not supported by the controlling case law, and should be disregarded. Petitioner was provided with a full opportunity to litigate the issue of probable cause at his preliminary examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

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